BEFORE THE DEPARTMENT OF
NATURAL RESOURCES AND CONSERVATION
OF THE STATE OF MONTANA

* * * * * * * *

IN THE MATTER OF THE APPLICATION)
FOR BENEFICIAL WATER USE PERMIT) FINAL ORDER
NO. 64965-s76LJ BY HERBERT GRAY)

* * * * * * * *

The time period for filing exceptions, objections, or comments to the Proposal for Decision in this matter has expired.

The Confederated Salish and Kootenai Tribes of the Flathead Nation ("CS&KT") submitted exceptions to the Proposal for Decision in this matter. The CS&KT are not parties to this matter, however, and therefore do not have the right to file exceptions. See Mont. Code Ann. § 2-4-621(1) (1979); see also Objection to Proposal for Decisions and Order, Preliminary Statement, submitted by CS&KT on July 9, 1990. For this, reason the exceptions submitted by CS&KT are stricken.

Objector United States Department of Interior ("USDI") filed an exception to the Proposal's determination of the issue raised by their original assertion that the Department of Natural Resources and Conservation ("Department") lacks jurisdiction to administer or regulate waters which arise upon or flow under or through, or the proposed use of which occurs within the exterior boundaries of, the Flathead Indian Reservation. Since the Proposed Order, adopted herein as the Department's Final Order, based on the evidentiary hearing in this matter denies the Application, the issue raised by Objector USDI is moot as to this Application.

Therefore, having given the matter full consideration, the Department hereby accepts and adopts the Findings of Fact and Conclusions of Law as contained in the May 7, 1990 Proposal for Decision, and incorporates them herein by reference.

WHEREFORE, based upon the record herein, the Department makes the following:

ORDER

Application for Beneficial Water Use Permit No. 64965-s76LJ hereby is denied without prejudice.

NOTICE

The Department's Final Order may be appealed in accordance with the Montana Administrative Procedure Act by filing a petition in the appropriate court within 30 days after service of the Final Order.

Dated this 21 day of June, 1991.

Gary Fritz, Administrator
Department of Natural Resources
and Conservation
Water Resources Division
1520 East 6th Avenue
Helena, Montana 59620-2301
(406) 444-6605

CERTIFICATE OF SERVICE

This is to certify that a true and correct copy of the foregoing Final Order was duly served upon all parties of record at their address or addresses this 24th day of June, 1991 as follows:

CASE #

Herbert Gray
#10 Penney Lane
Columbia Falls, MT 59912

John C. Chaffin
U.S. Department of Interior
Office of the Solicitor
P.O. Box 31394
Billings, MT 59107-1394

Chuck Brasen, Field Manager
Kalispell Field Office
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Kalispell, MT 59901

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Water Administrator
Confederated Salish and
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P.O. Box 278
Pablo, MT 59855

Cindy G. Campbell
Hearings Unit Legal Secretary

CASE # 64965

BB

BEFORE THE DEPARTMENT OF
NATURAL RESOURCES AND CONSERVATION
OF THE STATE OF MONTANA

* * * * * * * *

IN THE MATTER OF THE APPLICATION FOR BENEFICIAL WATER USE PERMIT NO. 64965-s76L BY HERBERT GRAY	)))	PROPOSAL FOR DECISION

* * * * * * * *

Pursuant to the Montana Water Use Act and to the contested case provisions of the Montana Administrative Procedure Act, a hearing was held in the above-entitled matter on October 26, 1988 in Kalispell, Montana.

Herbert Gray, the Applicant in this matter, appeared at the hearing in person.

Objector United States Department of Interior appeared at the hearing by and through counsel John C. Chaffin.

Douglas Oellermann appeared as a witness for the Objector.

Charles Brasen, Field Manager of the Kalispell Water Rights Bureau Field Office, appeared as staff witness for the Department of Natural Resources and Conservation (hereafter, the "Department").

PRELIMINARY MATTERS

The United States Department of Interior's initial objection to the application in this matter was based upon its position that the Department of Natural Resources and Conservation does not have jurisdiction to administer or regulate waters which arise upon or flow under or through, or the proposed use of which

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occurs within the exterior boundaries of, the Flathead Indian Reservation. (See Department file.)

The Department asserts jurisdiction in this matter. A complete discussion of this finding of jurisdiction is contained in the Memorandum which accompanies this Proposal for Decision.

EXHIBITS

The Applicant offered one exhibit for inclusion in the record in this Matter:

Applicant's Exhibit 1 is a chart purporting to show the average and minimum flows in the Flathead River and various tributaries thereto at specified locations.

Counsel for the Objector expressed concern that the figures shown on Applicant's Exhibit 1 differed from those on a nearly identical exhibit offered at a hearing In the Matter of Application for Beneficial Water Use Permit No. 62935-s76LJ by Crop Hail Management. The concern expressed by counsel was based on the Objector's stipulation that the discussion in Crop Hail Management, for which the exhibit was prepared originally, adequately explained the exhibit but would not apply to any discrepancy included in the version of the exhibit offered in the present matter.

Counsel requested that the Hearing Examiner take judicial notice of the discussion pertaining to the diagram included in the Crop Hail Management record, and that the two exhibits be compared to see if any discrepancies exist. The Hearing Examiner agreed to take notice of the pertinent discussion in the Crop

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Hail Management hearing record, and a comparison of the two exhibits show no discrepancy in the figures. Therefore, Applicant's Exhibit 1 has been accepted for the record.

The Objector offered two exhibits for inclusion in the record:

Objector's Exhibit 1 consists of photocopies of flow measurement records for the USGS gauging station on the Flathead River at Columbia Falls from 1939 through 1980 (42 pages).

Objector's Exhibit 2 consists of photocopies of Montana Power Company's yearly Water Use Summary from 1938 through 1980 (43 pages).

Objector's Exhibits 1 and 2 were accepted for the record without objection.

The Department did not offer any exhibits for inclusion in the record. The Department file was made available at the hearing for review. No party objected to the admission of any part of the file. Therefore, the Department file in this matter is included in the record in its entirety.

The Hearing Examiner, having reviewed the record in this matter and being fully advised in the premises, does hereby make the following proposed Findings of Fact, Conclusions of Law, and Order.

FINDINGS OF FACT

1. Section 85-2-302, MCA, states, in relevant part, "Except as otherwise provided in (1) through (3) of 85-2-306, a person may not appropriate water or commence construction of diversion,

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impoundment, withdrawal, or distribution works therefor except by applying for and receiving a permit from the department". The exceptions to permit requirements listed in § 85-2-306, MCA, do not apply in this matter.

2. Application for Beneficial Water Use Permit No. 64965-s76L was duly filed with the Department of Natural Resources and Conservation on December 2, 1986 at 2:55 p.m.

3. The pertinent portions of the Application were published in the Daily Inter Lake, a newspaper of general circulation in the area of the source, on February 18 and 25, 1987.

4. The source of water for the proposed appropriation is surface water from Whitefish River, a tributary of the Flathead River.

5. The Applicant has applied for 420 gallons per minute ("gpm") up to 142.8 acre-feet of water per year for sprinkler irrigation of 60 acres: 40 acres in the NE¼SE¼ of Section 21 and 20 acres in the NW¼SW¼ of Section 22, Township 30 North, Range 21 West, Flathead County, Montana. Water would be diverted from the Whitefish River by means of a pump located at a point in the NE¼NW¼SW¼ of Section 22, Township 30 North, Range 21 West, Flathead County. The proposed period of appropriation is April 15 through October 31, inclusive of each year. (The Hearing Notice states October 30 as the end date for appropriation; however, the Applicant and Field Manager Charles Brasen testified that the 30th is an erratum, and the intent is to run the period of appropriation through the last day of October.)

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6. The Applicant testified that his exact project plans are not formulated yet. He first intended to develop a farm, but has considered opening a trail packing business in the Flathead Valley, utilizing horses or possibly llamas. Another possibility being considered is the raising of draft horses. The Applicant has not determined which plan he will develop, but in any event, irrigation will be needed for pasture. The Applicant does not intend to raise production crops such as grains.

The volume requested is based on Soil Conservation Survey water requirements for grass for the climatic area, assuming a semi-drought year and 70% sprinkler efficiency. (Testimony of Charles Brasen.) The applicant testified that the flow rate request was based on the acreage of the proposed place of use, and knowledge that part of the acreage has been irrigated (by a previous owner) with a Rainbird sprinkler system. The Applicant wants to incorporate a "gun" that will cover a long distance in the sprinkler system, so that some trees can be left on the property.

In reference to the construction, maintenance, and operation of the proposed project, the Applicant testified that he will complete the diversion works and irrigation system under the supervision of skilled professionals, and that he has already contacted someone with technical skill to inspect the area and install the irrigation system.

7. The Applicant presented evidence designed to show that there are unappropriated waters in the source of supply.

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A review of the record In the Matter of the Application for Beneficial Water Use Permit No. 62935-s76LJ by Crop Hail Management indicates that the data summarized in Applicant's Exhibit 1 was derived from a standard reference book entitled Surface Water Supply of the United States, 1961-65 and from USGS water resources data. (See "Exhibits", above.) The information so compiled was utilized to develop estimates of the average and minimum flows of gauged tributaries to the Flathead River, and at Holt station (immediately above the mouth of the Flathead River) and Kerr Dam (downriver from Flathead Lake).

The Applicant testified that it is his understanding that Kerr Dam is required to release a minimum flow of 2,400 cfs (although he does not know whether this minimum can include water that goes through the turbines), and that a minimum of 2,615 cfs passes Holt station above Flathead Lake (the lowest measurement taken at this gauge between 1965 and 1970); therefore, he believes a comparison yields a calculation of 215 cfs left for use. If the estimated 149 cfs of existing water uses between Columbia Falls and the Lake is subtracted, then 66 cfs is left for new appropriations. The Applicant added that water contributions to Flathead Lake were not limited to the water in Flathead River, since other tributaries flow into the Lake.

The Applicant testified that he calculated that the minimum flow "necessary" at Kerr Dam is 1,000 cfs more than is needed to put through the turbines. However, he did not state whether his reference to "necessary" flows refers to the amounts needed to

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meet power generation requirements or to amounts released, nor did he explain where he derived the figure of 1,000 cfs "excess". A review of the relevant discussion in Crop Hail Management does not provide any clarification of the data provided by the Applicant.

The Applicant states that he has observed the Whitefish River as it flows by his property and that it always has a "very adequate" flow; further, that the Whitefish River has an adequate flow even below the major agricultural withdrawals from the Whitefish downstream from his place, based on his observations.

8. The Applicant testified that he understands that the Department of Interior has reserved water rights at Hungry Horse Dam and on the upper Flathead, and that there are tribal water rights on the Flathead. He stated that he has agreed to condition his permit to recognize these senior water rights, and that the water rights of prior appropriators should not be adversely affected by his proposed use, since permit conditions will make his water use subject to all prior rights.

9. Objector's witness Douglas Oellermann testified that the United States Bureau of Reclamation is required to maintain instream flows of 3,500 to 4,500 cfs between Hungry Horse Dam and Flathead Lake on a year-round basis, for maintenance of the fishery. The requirement is imposed by an agreement developed by the Northwest Power Planning Council. Bureau of Reclamation releases stored water from Hungry Horse Reservoir whenever it is

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necessary in order to ensure a flow of 3,500 cfs in the Flathead River.

Mr. Oellermann stated that an examination of the average monthly flows as determined from USGS flow records on the Flathead River at Columbia Falls (1939-1980) indicates that the average monthly flows (prior to the 1987 instituting of releases by Bureau of Reclamation) fell below 4,500 cfs 34% of the time. However, a review of the 1987 Northwest Power Planning Council agreement shows that 4,500 cfs is the maximum flow allowed during spawning season (see Section 903(a)(1)(A) of the Columbia River Basin Fish and Wildlife Program), rather than a minimum required to be maintained. Mr. Oellermann did not specify how often the 3,500 cfs minimum was not met by average monthly flows.

Mr. Oellermann testified that the present Application could have a net detrimental effect to the Department of Interior because of its impact on storage at Hungry Horse Dam. Although Mr. Oellermann did not specify what impact the Objector believes the Applicant's appropriation could have on storage, or the extent of the impact, it may be inferred that the Objector believes the proposed appropriation would result in a deficit to the minimum instream flow, necessitating releases of stored water.

10. Douglas Oellermann testified that the Confederated Salish and Kootenai Tribes have aboriginal fishing rights in the Flathead River which could be impacted by further diversions of water. The amount of water necessary to sustain the fishery has

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not yet been quantified, although the Tribes currently are negotiating with the State.

Mr. Oellermann testified that the Bureau of Indian Affairs also has an interest in Kerr Dam, since the Tribes will take over the dam operation in 30 years, pursuant to a new joint license issued by the Federal Energy Regulatory Commission. He stated that any increased water use above Kerr Dam will have an effect on the dam, since Montana Power Company will have to draw on stored water in Flathead Lake sooner to make up for any decreases in natural flow.

MPC's maximum water use is only slightly less than its claimed flow rate of 14,540 cfs, and water is bypassed only if it cannot be used for power generation. The normal operating procedure at the power plant provides whatever instream flows are required below the dam by MPC's operating agreement with the Bonneville Power Administration, according to Mr. Oellermann's testimony. No testimony or documentation was presented as to what constitutes "normal operating procedures", or what instream flow requirements are imposed on Kerr Dam operations. Testimony by the witness and statements by counsel indicate that the flow data recorded by MPC reflects some inherent inaccuracies in MPC's measuring system.

11. The Objector also alleges that the Applicant's proposed appropriation could adversely impact water uses by the Flathead Irrigation Project, which has a pumping plant located in the forebay at Kerr Dam.

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The Bureau of Indian Affairs/Flathead Irrigation Project pumps 210 cfs of water out of the Flathead River at Kerr Dam, to be delivered to Pablo Reservoir for use in the irrigation project. Although Flathead Irrigation Project does not pump through the Kerr Dam facility every year, it pumps almost continuously during water-short years when adequate water cannot be obtained from Flathead Irrigation Project's other water sources. (Testimony of Doug Oellermann.)

If natural flows reaching Kerr Dam drop, and as a result MPC has to draft on storage in Flathead Lake to maintain power generation at Kerr, the water level in the stretch of river above the dam and in the dam forebay can be drawn down by as much as ten feet, which exposes Flathead Irrigation Project's intake pipes and necessitates shutting down the pumps. The pumps, which were installed in the late 1930's or early 1940's, are vertical turbine pumps which cannot be modified to take water from a lower level. The entire pumping station would have to be modified at great cost in order to make pumping at lower water levels possible. (Testimony of Doug Oellermann.)

The Objector alleges that any increased water use in the drainage basin which serves Kerr Dam will have a net detrimental effect on Flathead Irrigation Project's pumping station, by making it more likely that MPC will draft on storage and thereby draw down the forebay.

12. The Applicant testified that he believes the Objector is basing its arguments on unsubstantiated data and vague guesses

as to possible connections and effects. He stated that he believes water is available for present uses in spite of possible future demands, and that he is concerned that if the State does not allow the water to be developed and beneficially used, it may be reallocated for use outside the State to meet increasing demands elsewhere.

Based upon the foregoing Findings of Fact and upon the record in this matter, the Hearing Examiner makes the following:

PROPOSED CONCLUSIONS OF LAW

1. The Department gave proper notice of the hearing, and all relevant substantive and procedural requirements of law or rule have been fulfilled, therefore the matter was properly before the Hearing Examiner.

2. The Department has jurisdiction over the subject matter herein and the parties hereto. See Memorandum.

3. The Department must issue a Beneficial Water Use Permit if the Applicant proves by substantial credible evidence that the following criteria, set forth in § 85-2-311, MCA, are met:

> (a) there are unappropriated waters in the source of supply:
> (i) at times when the water can be put to the use proposed by the applicant;
> (ii) in the amount the applicant seeks to appropriate; and
> (iii) throughout the period during which the applicant seeks to appropriate, the amount requested is available;
> (b) the water rights of a prior appropriator will not be adversely affected;
> (c) the proposed means of diversion, construction, and operation of the appropriation works are adequate;

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(d) the proposed use of water is a beneficial use;

(e) the proposed use will not interfere unreasonably with other planned uses or developments for which a permit has been issued or for which water has been reserved.

4. The proposed use of water, for irrigation, is a beneficial use of water. See § 85-2-102(2), MCA.

5. The proposed means of diversion, construction, and operation of the appropriation works are adequate. See Findings of Fact 5 and 6.

6. There is no evidence to suggest that the Objector's water rights would be adversely affected by the Applicant's proposed appropriation.

Objections were made on behalf of the Bureau of Reclamation, based on the protection of the 3,500 cfs minimum instream flow which the Bureau is required to maintain from Hungry Horse Dam downstream to Flathead Lake. (See Finding of Fact 9.) However, there is no evidence to suggest that the Bureau of Reclamation has any protectible water right for the instream flow which could be adversely affected.

A review of the 1987 Northwest Power Planning Council agreement which embodies the requirement that the Bureau of Reclamation maintain the 3,5000 cfs minimum instream flow indicates that the fish and wildlife program established by the NWPPC does not purport to authorize appropriations, effect water rights or jurisdictions over water, or establish the respective water rights of federal and state entities, tribes, and individuals. Federal agencies implementing the program are urged

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to develop ways to implement the water flow measures in accordance with this disclaimer. (See Section 107 of the 1987 Columbia River Basin Fish and Wildlife Program.) Clearly, the NWPPC agreement does not establish an independent water right for the maintenance of the instream flows.

A review of the Statements of Claim for Existing Water Rights filed on behalf of Bureau of Reclamation in the adjudication process also does not show any water right which may be utilized for the purpose of maintaining the instream flow. The Bureau of Reclamation does not have any Claim for fish and wildlife purposes which has been recognized in the temporary preliminary decree,[1] nor has it applied for and been granted authorization to change the purpose of use of any of its recognized claims to fish and wildlife maintenance. Therefore, there is no basis on which the Department may recognize the maintenance of the 3,500 cfs minimum instream flow as a protectible water right.

The objection made on behalf of the Flathead Irrigation Project states with particularity the potential adverse effect to the Project's prior appropriation rights (see Finding of Fact

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[1] The Bureau of Reclamation filed Claim No. 134911-76J in the adjudication process, claiming fish and wildlife use for Hungry Horse water. However, the temporary preliminary decree for the basin does not list this Claim as a valid water right. Since the prima facie status of a claim is superseded by issuance of a temporary preliminary decree of preliminary decree for purposes of administering water rights (see Chapter 604, Laws of Montana 1989), the Bureau does not have a recognized existing water use right for fish and wildlife purposes on this source (Hungry Horse).

to fulfill senior water uses). See generally In the Matter of Application for Beneficial Water Use Permit No. 60662-s76G by Wayne and Kathleen Hadley, March 21, 1988 Proposal for Decision.

Since the Applicant presented uncontradicted testimony that water is present at his property at all times in "very adequate" amounts, there is substantial credible evidence that water is physically available at the proposed point of diversion. (See Finding of Fact 7.) However, the Applicant has failed to provide substantial credible evidence that the water which is present at his point of diversion is not needed downstream to fulfill senior water uses.

The flow data provided by the Applicant (Applicant's Exhibit 1) cannot be said to be probative on the issue of water availability. Applicant's calculation of 1,000 cfs of "necessary" flow being available at Kerr Dam in addition to the flow needed for power generation is unclear and completely unsubstantiated. Even a comparison of the 2,400 cfs released at Kerr with the minimum 2,615 cfs flow passing Holt is suspect, given not only the absence of rationale for the comparison, but also the possibility that the 215 cfs difference constitutes part of MPC's storage right or is being consumptively used by municipal and private water users on Flathead Lake. (See Finding of Fact 7.) Therefore, the Applicant has failed to meet his burden of proof on the statutory criteria of unappropriated water and of adverse effect to prior appropriators other than the Objector.

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WHEREFORE, based upon the foregoing proposed Findings of Fact and Conclusions of law, and upon the record in this matter, the Hearing Examiner makes the following:

PROPOSED ORDER

Application for Beneficial Water Use Permit No. 64965-s76LJ hereby is denied without prejudice.

NOTICE

This proposal is a recommendation, not a final decision. All parties are urged to review carefully the terms of the proposed order, including the legal land descriptions. Any party adversely affected by the Proposal for Decision may file exceptions thereto with the Hearing Examiner (1520 East 6th Avenue, Helena, Montana 59620-2301); the exceptions must be filed and served upon all parties within 20 days after the proposal is mailed. Section 2-4-623, MCA. Parties may file responses to any exception filed by another party within 20 days after service of the exception.

Exceptions must specifically set forth the precise portions of the proposed decision to which exception is taken, the reason for the exception, and authorities upon which the exception relies. No final decision shall be made until after the expiration of the time period for filing exceptions, and the due consideration of any exceptions which have been timely filed.

Any adversely affected party has the right to present briefs and oral arguments pertaining to its exceptions before the Water

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Resources Division Administrator. A request for oral argument must be made in writing and be filed with the Hearing Examiner within 20 days after service of the proposal upon the party. Section 2-4-621(1), MCA. Written requests for an oral argument must specifically set forth the party's exceptions to the proposed decision.

Oral arguments held pursuant to such a request normally will be scheduled for the locale where the contested case hearing in this matter was held. However, the party asking for oral argument may request a different location at the time the exception is filed.

Parties who attend oral argument are not entitled to introduce new evidence, give additional testimony, offer additional exhibits, or introduce new witnesses. Rather, the parties will be limited to discussion of the evidence which already is present in the record. Oral argument will be restricted to those issues which the parties have set forth in their written request for oral argument.

Dated this 7th day of May, 1990.

Peggy A. Elting

Peggy A. Elting, Hearing Examiner
Department of Natural Resources
and Conservation
1520 East 6th Avenue
Helena, Montana 59620-2301
(406) 444-6612

CASE # 64965

CERTIFICATE OF SERVICE

This is to certify that a true and correct copy of the foregoing Proposal for Decision was duly served upon all parties of record at their address or addresses this 7 day of May, 1990, as follows:

Herbert Gray
1034 4th Avenue East
Kalispell, MT 59901

U.S. Department of Interior
Office of the Solicitor
P.O. Box 31394
Billings, MT 59107-1394

Chuck Brasen, Field Manager
Kalispell Field Office
P.O. Box 860
Kalispell, MT 59901

Irene V. LaBare
Legal Secretary

CASE # 64965

BEFORE THE DEPARTMENT OF
NATURAL RESOURCES AND CONSERVATION
OF THE STATE OF MONTANA

* * * * * * * * * * * * *

IN THE MATTER OF THE APPLICATION FOR BENEFICIAL WATER USE PERMITS NOS. 66459-76L, Ciotti; 62935-s76LJ, Crop Hail Management; 63574-s76L, Flemings; 64965-s76LJ, Gray; 63023-s76L, Rasmussen; 64988-g76LJ, Starner; and APPLICATION FOR CHANGE OF APPROPRIATION WATER RIGHT NO. G15152-S76L, Pope.	ORDER

* * * * * * * * * * * * *

The Confederated Salish and Kootenai Tribes and the United States Department of Interior have appeared in the seven captioned proceedings to contest the jurisdiction of the Montana Department of Natural Resources and Conservation to issue water use permits for the use of non-reserved water by non-Indians on fee lands on the Reservation. Their motion to dismiss for lack of jurisdiction was certified to the Director, pursuant to ARM 36.12.214.

ORDERED that, as described in the attached Memorandum, the Montana Department of Natural Resources and Conservation maintains that it has regulatory jurisdiction over new appropriations of non-reserved water by non-Indians on fee lands within the Reservation.

DATED this 30th day of April, 1990.

Karen L. Barclay
Director

CASE #

BEFORE THE DEPARTMENT OF NATURAL RESOURCES AND CONSERVATION OF THE STATE OF MONTANA

* * * * * * * * * * * * *

IN THE MATTER OF THE APPLICATION FOR BENEFICIAL WATER USE PERMITS NOS. 66459-76L, Ciotti; 62935-s76LJ, Crop Hail Management; 63574-s76L, Flemings; 64965-s76LJ, Gray; 63023-s76L, Rasmussen; 64988-g76LJ, Starner;	
and	
APPLICATION FOR CHANGE OF APPROPRIATION WATER RIGHT NO. G15152-S76L, Pope.	**MEMORANDUM**

* * * * * * * * * * * * *

The Confederated Salish and Kootenai Tribes ("Tribes") and the United States Department of Interior ("United States") have appeared in the seven captioned proceedings to contest the Montana Department of Natural Resources and Conservation ("DNRC") jurisdiction to issue water use permits on the Flathead Reservation.

Among the arguments raised by the Tribes and the United States are:

- because the DNRC permit process involves a piecemeal adjudication of existing rights, the DNRC lacks jurisdiction under the McCarren Amendment, 43 U.S.C. § 666; further, state statutes have suspended the DNRC permit process while negotiation of federal reserved rights is pending;
- federal law requires that federal reserved rights be finally adjudicated before Montana can regulate surplus water on the Reservation; and,
- absent express Congressional authorization, Montana's water use statutes are inapplicable on the Reservation.

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Having carefully considered the arguments and authorities offered by the Tribes and the United States, the DNRC continues to assert its regulatory jurisdiction over the use of non-reserved water by non-Indians on fee lands within the Reservation.

1. The McCarren Amendment is not applicable because the DNRC permit process is not an adjudication of existing rights.

In the McCarren Amendment Congress consented to the joinder of the United States in any suit for the "adjudication of rights to the use of water of a river system or other source". The Amendment requires Indian Tribes, and the United States as trustee for tribes, to submit claimed federal reserved water rights to a state's general water rights adjudication. See Arizona v. San Carlos Apache Tribe, 463 U.S. 545 (1983). Contrary to the assertions of the Tribes and the United States, the McCarren Amendment does not apply to the DNRC water use permit process. Montana statutes make a clear distinction between the DNRC process and the State's general water rights adjudication.

Montana's general water rights adjudication applies only to "existing" water rights, which are those with a priority date earlier than July 1, 1973. Mont. Code Ann. § 85-2-102(9). Formal adjudication of the priorities, scope, and extent of existing rights is the exclusive function of district court water judges. See Mont. Code Ann. Title 3, Chapter 7. Montana's general adjudication is currently pending in the Montana state

courts. Mont. Code Ann. §§ 85-2-201 et seq. Federal reserved rights are included in the adjudication process and will either be decreed by the state court or negotiated with the Reserved Water Rights Compact Commission. Mont. Code Ann. § 85-2-217.

In contrast to the adjudication of existing rights, the DNRC permit process is a method of reviewing proposed new uses of water. Since July 1, 1973, a person planning to appropriate water must apply for and receive a permit from the DNRC. Mont. Code Ann. § 85-2-302. To obtain a permit, the applicant must demonstrate, among other things, that there is unappropriated water at the point of diversion, and that the water rights of prior appropriators will not be adversely affected. Mont. Code Ann. § 85-2-311.

Contrary to the Tribes' argument, in determining whether there is unappropriated water the DNRC does not adjudicate existing water rights, but simply requires the applicant to present evidence of water physically available at the proposed point of diversion. See Mont. Code Ann. § 85-2-311(1)(a). Similarly, the DNRC does not determine the validity of existing rights when it reviews for adverse effect on existing water rights. If a question is raised concerning the validity of an existing right, the DNRC may certify the question to a water judge. Mont. Code Ann. § 85-2-309(2). This distinction between the adjudication and the DNRC process is also clearly shown by Mont. Code Ann. § 85-2-313, which provides that permits issued by the DNRC are "provisional", and are subject to the final determination of existing rights by a water judge.

Thus, because the DNRC permit process is not an "adjudication", the provisions of the McCarren Amendment are inapplicable. The clear distinction between the DNRC process and the adjudication also makes inapplicable the statute suspending "proceedings to generally adjudicate" federal reserved water rights while negotiation of those rights is pending. Mont. Code Ann. § 85-2-217.

2. **The State of Montana has regulatory jurisdiction over the use of non-reserved water by non-Indians on fee land within the Reservation. The State has a strong interest in developing a comprehensive water regulation system for state citizens. By contrast, the Tribes have no regulatory interest over surplus waters on Reservation fee lands. Tribal or federal water rights are given adequate protection in Montana's permitting process, even though the federal rights have not been finally adjudicated.**

DNRC water use permits are issued only for surplus water, which is water available after existing rights, including reserved rights, are satisfied. Federal courts have long recognized that the state has jurisdiction over water in excess of that needed for federal reserved rights. See, eg: Conrad Investment Co. v. United States, 161 F. 829, 834 (9th Cir. 1908); United States v. Ahtanum Irrigation District, 236 F.2d 321, 327 (9th Cir. 1956). The more specific question of when a state may exercise its jurisdiction over surplus water on a reservation has been addressed in two recent federal decisions: Colville Confederated Tribes v. Walton, 647 F.2d 42 (9th Cir. 1981) and United States v. Anderson, 736 F.2d 1358 (9th Cir. 1984). These cases adopted a balancing test to weigh the state, federal, and

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tribal interests involved in extending state regulatory jurisdiction onto a reservation:

> [Where] a state asserts authority over the conduct of non-Indians engaging in activities on the reservation [the court must make a] particularized inquiry into the nature of the state, federal and tribal interests at stake, an inquiry designed to determine whether in the specific context, the exercise of state authority would violate federal law.

Anderson, supra at 1365, quoting White Mountain Apache Tribe v. Bracker, 448 U.S. 136, 145 (1980).

Both the Walton and Anderson courts recognized that states have a strong interest in developing a comprehensive water regulation system for state citizens. Congress also has recognized this interest, and has adopted a policy of deference to state water law:

> In a series of Acts culminating in the Desert Lands Act of 1877, ch. 107, 19 Stat. 377, Congress gave the states plenary control of water on the public domain. California - Oregon Power Co. v. Beaver Portland Cement Co., 295 U.S. 142, 163-64, 55 S.Ct. 725, 731, 79 L. Ed. 2d 1356 (1935). Based on this and other legislation, the Supreme Court concluded that Congress almost invariably defers to state water law when it expressly considers water rights. United States v. New Mexico, 438 U.S. 696, 702, 98 S. Ct. 3012, 3015, 57 L.Ed.2d 1052 (1978).

Walton, supra, at 53. See also: Anderson, supra, at 1365.

Walton and Anderson also established that a state's interest in water regulation does not necessarily end at a reservation boundary. The weight of the state's on-reservation regulatory interest depends on the extent to which on-reservation water use has off-reservation effects. See Anderson, supra, at p. 1366. In Walton, the stream in question was small, non-navigable, and began and ended entirely on the Reservation. 647 F.2d at 52. The court found that tribal control of the stream would have "no

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impact on state water rights off the reservation." Id at p. 53. Accordingly, the Walton court concluded that the state's regulatory interest was limited and that the policy of federal deference to state water law did not apply. The court also noted that validation of the state permits at issue could have jeopardized the agricultural use of downstream tribal lands as well as the existence of the tribal fishery. Id at p. 52.

In Anderson, on the other hand, the stream in question formed a reservation boundary, and was a tributary to the Spokane and Columbia Rivers. 736 F.2d at p. 1366. This fact gave the state a strong interest in extending its regulatory authority to surplus waters on-reservation. Id. at 1304. The court then considered whether tribal rights would be adversely affected by state regulation, and found that tribal water rights were adequately protected by quantification in a federal decree and oversight by a federal master. Id at p. 1365, 1366. Finally, the court noted that some of the affected non-Indian lands on-reservation had been opened for settlement under the Homestead Act. Id at pp 1365-66. These factors led the court to rule in favor of state jurisdiction on-reservation.

Of the seven DNRC permits and change authorizations at issue here, three projects are entirely off-reservation. Crop Hail Management, Permit Application No. 62935-s76LJ; Gray, Permit Application No. 64965-s76L; Rasmussen, Permit Application No. 63023-s76L. None of the legal authorities cited by the Tribes or the United States suggests that the DNRC lacks jurisdiction to issue these off-reservation water use permits.

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The three remaining permit applications and one change authorization application all have points of diversion on fee land on the Reservation. In each case, the diversion is from a tributary of the Flathead River system, one of the major river systems in northwest Montana, which in turn is a major tributary of the Clark Fork of the Columbia River. None of the streams involved has the unusual closed-basin hydrology that led the Walton court to depart from the federal rule of deference to state water regulation. Because these on-reservation streams are tributary to waterways that transcend the reservation boundaries, the state has a strong regulatory interest in this case, pursuant to Anderson. This case also resembles Anderson in that the Flathead Reservation contains substantial lands opened to non-Indian settlement under homestead laws. See Joint Board of Control of Flathead, Mission v. U.S. 646 F.Supp. 410, (D. Montana 1986), rev'd on other grounds 832 F.2d 1127 (9th Cir. 1987).

By contrast, the Tribes have no regulatory interest over surplus waters on Reservation fee lands. Tribal power to regulate the conduct of non-Indians on land no longer owned by or held in trust for the Tribes has been impliedly withdrawn as a necessary result of tribal dependent status. Montana v. United States, 450 U.S. 544, 564 (1981). Absent express Congressional delegation, the Tribes lack authority to regulate non-Indian activities on fee land. Brendale v. Confed. Tribes and Bands of Yakima Indian Nation, 57 USLW 4999, 5005 (1989). Even where tribal interests are affected, tribes have been directed to seek

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recognition and protection of their rights in the state forum, rather than to challenge the jurisdiction of that forum. Id.

In this case, tribal or federal interests are adequately protected by Montana's permitting process. In the first place, DNRC permits are issued only for surplus water available after federal reserved rights are satisfied. The permits contain the following condition subordinating them to Indian water rights:

> This permit is specifically made subject to all prior Indian reserved water rights of the Confederated Salish and Kootenai Tribes in the source of supply. The permittees are hereby notified that any financial outlay or work they may choose to invest in their project pursuant to this Permit is at their own risk, since the possibility exists that water may not be available for their project once tribal reserved water rights are quantified by a forum of competent jurisdiction.

Montana statutes also emphasize that DNRC permits are subject to existing water rights. See Mont. Code Ann. §85-2-313. Both by express condition and by statute, then, DNRC permits are valid only to the extent that the prior federal reserved rights are adequately protected. Thus, as a matter of law, federal reserved rights will not be harmed by the DNRC permitting process.

Second, actual conflicts with existing uses of federal rights can be screened in the DNRC permit process. Advance public notice is given of every proposed permit, and claimants of existing water rights have the opportunity to present evidence to the DNRC concerning the specific requirements of their senior water use. The DNRC may not issue the permit unless the applicant proves that the water rights of prior appropriators will not be adversely affected. Mont. Code Ann. § 85-2-311(1)(b). The United States in fact presented evidence in two

of the instant permit application hearings. In Flemings, supra, the BIA offered data about instream flows needed to sustain a claimed tribal fishing right. In Rasmussen, supra, the BIA testified concerning the proposed permit's effect on the water requirements of the Flathead Irrigation Project. Under the Supreme Court's recent decision in Brendale, the availability and flexibility of the DNRC process makes it the preferred forum to regulate use of non-reserved waters on reservation fee lands.

Contrary to the argument of the United States, federal law does not require final adjudication of reserved rights before states can exercise their authority over surplus water on-reservation. Although the Anderson court indicated that quantification of federal rights and their administration by a federal master was "central" to its decision, later decisions in the Ninth Circuit have not shared that concern. Holly v. Totus, 655 F.Supp. 548 (E.D. Wash. 1983), aff'd in part unpub. opin., 749 F.2d 37 (9th Cir. 84); and Holly v. Conf. Tr. and Bands of Yakima Indian Nation, 655 F. Supp. 557 (E.D. Wash. 1985), aff'd unpub. opin. 812 F.2d 714 (9th Cir. 1987), cert. den. 108 S.Ct. 85 (1987). In Holly, the court held that the Yakima Tribe lacked jurisdiction to regulate non-Indian use of surplus water on fee land on-reservation. The court declined to rule whether the state had such jurisdiction, finding that the absence of the United States as a party precluded a "particularized inquiry into the nature of the state, federal, and tribal interests at stake". 655 F. Supp. at 599. As in Montana, the tribal and federal water rights in Holly were still in the process of a state

adjudication. See 655 F. Supp. at 554-55; 655 F.Supp. at 559 n.2. Significantly, however, the Holly court did not treat the lack of a final adjudication as increasing the tribal regulatory interest or as jeopardizing tribal water rights. This suggests that federal courts may not require a final adjudication, but will consider other mechanisms that protect federal rights. In this case, adequate protection is provided by subordination of DNRC permits to senior federal rights, and by the case-by-case review of the DNRC permit process. Thus, both Holly and the present case show the artificiality of the adjudication "requirement."

Under state law as well, federal rights need not be adjudicated before they can participate in the DNRC permit process. Most existing water rights in Montana are still only in the preliminary stages of adjudication. Nevertheless, the DNRC has been reviewing existing rights in permit proceedings since 1973, pursuant to the State Water Use Act. See Mont. Code Ann. Title 85, ch. 2. The drafters of the Act recognized that the DNRC process rarely requires that the ultimate scope of an existing right be known. Rather, the DNRC review focuses more upon specific operation practices of existing rights, such as normal diversion rates and schedules, field rotations, and location and timing of return flow. This detailed information is not considered in the adjudication, but it is the primary basis for determining whether a new water use is compatible with practices of existing users. Thus, state law is designed to allow the permit and adjudication processes to run concurrently.

3. Congressional approval is not required for Montana water use statutes to apply to surplus water on the Reservation.

The Tribes and the United States also argue that, absent express Congressional authorization, Montana's water use statutes are invalid on the Reservation. The parties cite language to that effect in United States v. McIntire, 101 F.2d 650, 654 (9th Cir. 1939), and United States v. Alexander, 131 F.2d 359, 360 (9th Cir. 1942). However, the cited language is derived from very early Supreme Court cases, e.g., Worcester v. Georgia, 31 U.S. 515 (1832), and is no longer a correct statement of federal Indian law. The present rule is that Indian reservations are subject to state jurisdiction except as preempted by federal law or by tribal sovereignty. As outlined above, federal courts now use a balancing test to determine whether federal, state, or tribal regulatory interests are paramount. White Mountain Apache Tribe v. Bracker, supra, 448 U.S. at 143. See also, Organized Village of Kake v. Egan, 369 U.S. 60, 72 (1962); Mescalero Apache Tribe v. Jones, 411 U.S. 145, 148 (1973). If Walton appeared to endorse the McIntire rule, it has been implicitly overruled on that point by the analysis in Anderson, supra.

In any event, a closer reading of McIntire shows its actual holding to be that Montana appropriation statutes do not apply to reserved water on the Reservation. The issue concerned the validity of a state notice of appropriation filed by an Indian allottee while the allotted land was still in trust status. See 22 F. Supp. at 319, 101 F.2d at 652. Federal law is clear that

General Allotment Act allotments, while still in trust status, share in the tribal reserved rights. United States v. Powers, 305 U.S. 527 (1939), 25 U.S.C. § 331 et seq. Consequently, the attempted state appropriation of reserved water was invalid. Later federal decisions confirm that the McIntire ruling pertained to reserved water rather than surplus water. United States v. Alexander, 131 F.2d 359, 361 (9th Cir. 1942); United States v. Ahtanum Irr. Dist., supra at 340. See also, In re Rights to Use Water in Big Horn River, 753 P.2d 76, 114 (Wyo. 1988), cert. den. 109 S.Ct 3265 (1989).

As emphasized above, the DNRC is not asserting jurisdiction over reserved water, but only over surplus water available when reserved rights are satisfied. Federal courts have long recognized that such surplus water falls under state jurisdiction. Conrad Investment Co., supra.

CONCLUSION

In conclusion, under federal law Montana has regulatory jurisdiction over water in excess of that needed for federal reserved rights. Given the State's strong interest in comprehensive water regulation, Montana's jurisdiction over surplus water extends to fee land on the Reservation. Tribal and federal water rights, although not yet adjudicated, are adequately protected by the DNRC permit process.

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